See Vol. 3111. 2113

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

RAY W. CHRISTENSEN, TRUSTEE,

Appellant

-vs-

CASE NO. 18267

ROBERT T. FELTON and JEAN WILSON FELTON,

Appellees

REPLY TO PETITION FOR REHEARING

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TO THE HONORABLE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Robert T. and Jean W. Felton, respondents in the above entitled case and in this petition, do hereby submit a response to the petition for rehearing, pursuant to an order issued under Rule 23 by this Court on August 27, 1963.

1. Appellees have no knowledge of the existence of evidence contradicting testimony introduced before the referee and considered by the District Court; however, appellees are in no position to assert that such evidence does not exist after the assertion which appears in appellants' petition for rehearing.

2. The record is replete with evidence of the defalcations of petitioner's officers; this was presented

in the course of oral argument and considered by the Court in its opinion. In addition to this, counsel would point to the following portion of the transcript which falls outside the offer of proof and bears upon the issue of fraudulent diversion of assets.

> "McDonnell took possession of the physical assets of Washburn-Wilson and operated the same and the business in connection therewith in conjunction with McDonnell and combined the business operation of both corporations which created indebtedness to various creditors on account of uncollectable accounts receivable, which decreased the working capital of McDonnell and made operations of the combined businesses impossible without additional funds or extensions of credit." Exhibit #10 TR 218 (admitted in evidence)

3. We would call the attention of the Court to a case, F. H. McGraw Co. v. Wilcox Steel Co., 149 F2 301 (2nd Cir. 1945) cited in Appellees' brief in which the Court, in passing on consideration of evidence by it which was refused by the District Court, says at page 306: "And the objection is of no importance in any event at this stage of the case, because the evidence appears of record and we are entitled to consider it, if legitimate, even had the District Court actually excluded it for the purpose offered." This principle would appear to be even more appropriate as applied to consideration by the District Judge of evidence submitted by way of offer of proof before the referee. H

control over the referee is extensive, extending to modification of the referee's order or the receipt of further evidence leading to additional or contrary findings without resubmission to the referee. 11 U. S. C. 11, Section 2 (a) (10); General Order #47; II Colliers: 3928, page 1496 (14th Ed.).

4. In this case, proceedings before the referee occurred in which evidence relating to piracy of assets was excluded by him as irrelevant under the terms of the contract. On review by the District Judge, this ruling was overturned and the Trial Judge, in his opinion, states: "Here the purchaser and its officers from the record are shown to have breached their fiduciary duties to sellers and to have rendered the security worthless by their fraudulent conduct." (TR 85) The appellant did apply for rehearing, presumably under Rule 59, in the District Court and in this petition made no reference to the factual statement above set forth and no reference to the existence of further evidence bearing on the issue of piracy. Now, for the first time on appeal before this Court their suggestion of existence of this evidence is advanced. This would appear to be a case of invited error and barred by the familiar rule which requires issues to be presented for the first time in the Trial Court. Petitioner had ample opportunity to request the right

to introduce additional evidence before the Trial Court or, at that time, request remand to the referee. Appellant's argument has been addressed to the construction of this contract and only as an afterthought is this argument of inability to introduce contrary evidence raised. If there was any failure, it was on the part of appellant and falls within the rule of invited error; petitioner should not be extended the privilege of twice trying his case. He had his opportunity to present this additional evidence and waived it. After the extensive proceedings which have already occurred, he should not be permitted to return and relitigate this entire case. There must be an end to proceedings sometime, a rule of finality to meet straw-grasping.

We respectfully pray that the petition for rehearing be dismissed and the original order to affirm permitted to stand.

Respectfully submitted,

Philip E. Peterson

I, PHILIP E. PETERSON, Counsel of record for Petitioner, hereby certify that in my judgment the foregoing Reply to Petition for Rehearing is well founded and that it is not interposed for delay.

DATED this 18th day of Sept., 1963.

Philip E. Peterson